Supreme Court, U.S.
FILED
DEC 10 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-744

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

ARMCO, INC.,
Petitioner,

v.

THE MARYLAND CASUALTY COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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December 9, 1987

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QUESTION PRESENTED

Whether, under Maryland common law, the United States Court of Appeals for the Fourth Circuit sitting in diversity correctly determined that the terms of a 158-page insurance contract afforded no coverage for a lawsuit seeking equitable injunctive and restitutionary relief pursuant to the Comprehensive Environmental Response, Compensation and Liability Act and the Resource Conservation and Recovery Act?

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This is a declaratory judgment action between two large corporations brought under the district court's diversity jurisdiction. It requires the interpretation of a 158-page, hand-crafted insurance agreement negotiated between The Maryland Casualty Company ("Maryland Casualty")[1] and Armco, Inc. ("Armco"). The insurance

[1] The following list of parent companies, subsidiaries, and affiliates of The Maryland Casualty Company is submitted in accordance with Supreme Court Rule 28.1: Assurance Company of America; American General Fire and Casualty Company; Maine Bonding

contract was in effect, as modified from time to time, from 1966 until June 1, 1983. (App. 13.) Over the policy period, nineteen expert Armco corporate officials, including several full-time insurance specialists, participated with Maryland Casualty negotiators in refining the policy's terms, many of which were specifically developed by the parties.[2]

The resulting manuscript insurance agreement provides, in pertinent part, that Maryland Casualty will "pay on behalf of the insured all sums which the insured shall become legally obligated to pay *as damages*" because of bodily injury or property damage. (App. 13 (emphasis added).) Maryland Casualty also agreed to "defend any suit against the insured alleging such injury, sickness, disease or destruction *and seeking damages* on account thereof." (*Id.*)

In 1982, the United States sued Armco and others, alleging that they had caused an "endangerment to health, welfare or the environment" at a waste disposal site owned and operated by Conservation Chemical Company ("CCC"). First Amended Complaint ¶ 1, *United States v. Conservation Chem. Co.*, No. 82-0983-CV-W-5 (W.D. Mo.) ("*CCC*"). Paragraph 1 of the government's complaint stated:

> This is a civil action brought by the United States under Section 7003 of the Resource Conservation and Recovery Act ("RCRA") and Section 106 of the

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and Casualty Company; Maryland Insurance Company (Life); National Property Owners; Northern Insurance Company of New York; National Standard Insurance Company; Steadfast Insurance Company; and Valiant Insurance Company.

[2] A major insurance broker also aided Armco throughout the bargaining process. Armco itself is the 39th largest casualty insurer in the United States, with a multi-company insurance operation. *See* Joint Appendix at 370-71, 409, 413, 420-57, in *Maryland Casualty Co. v. Armco, Inc.*, No. 86-3125 (4th Cir. filed Sept. 24, 1986).

> Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") *for injunctive relief* to remedy a condition which may present an imminent and substantial endangerment to health, welfare or the environment . . . .

(Emphasis added; citations omitted.) The government also sought under RCRA Section 7003 and CERCLA Sections 104 and 107(a) "reimbursement of investigative and other expenses" it incurred at the site. *Id.*

When Armco asked Maryland Casualty to provide insurance coverage for the *CCC* suit, Maryland Casualty promptly declined, advising on several grounds that no such obligation arose under the parties' insurance agreement. Joint Appendix at 292-93, *Maryland Casualty Co. v. Armco, Inc.*, No. 86-3125 (4th Cir. filed Sept. 24, 1986). One reason cited by Maryland Casualty was the absence of coverage for suits that did not "seek[] damages" and for sums that were not payable "as damages." *Id.*

To obtain certainty as to its obligations, Maryland Casualty brought this action against Armco in the United States District Court for the District of Maryland, invoking that court's diversity jurisdiction. The parties filed cross-motions for summary judgment, raising a number of questions concerning the interpretation of their carefully structured agreement. They agreed, however, that, under the applicable choice-of-law rules, Maryland law controlled the interpretation of the insurance contract. 643 F. Supp. at 431 (App. 2-3).

On September 8, 1986, the district court entered summary judgment for Maryland Casualty, ruling that no coverage existed because the *CCC* suit did not seek "damages" within the meaning of the Maryland Casualty-Armco insurance agreement. Relying on an unbroken line of authority, it found the government's claim in *CCC* to be equitable. 643 F. Supp. at 435 (App. 9). The dis-

trict court also found that the State of Maryland's "[b]lack letter insurance law holds that claims for equitable relief are not claims for 'damages' under liability contracts." 643 F. Supp. at 432 (App. 3). Concluding that "Maryland Casualty is entitled to the benefit of its bargain," *id.* at 435 (App. 9), the district court granted it summary judgment.

The United States Court of Appeals for the Fourth Circuit unanimously affirmed. 822 F.2d 1348 (1987) (App. A-11 to A-24). It found the district court's decision consistent with the settled law of Maryland, the terms of the parties' negotiated insurance agreement, and public policy supporting enforcement of the contract as written. The Fourth Circuit also held that the district court had correctly concluded that the *CCC* suit sought equitable injunctive and restitutionary relief, and not damages. 822 F.2d at 1352 (App. 18). The Fourth Circuit denied Armco's motion for rehearing, with suggestion for rehearing *en banc*. No judge of that Court supported the request for *en banc* rehearing. (App. 25.)

Armco then petitioned for a writ of certiorari, seeking review in this Court of the Fourth Circuit's ruling.

SUMMARY OF ARGUMENT

The writ should be denied. This diversity case presents a state law question of private contract interpretation, over which the exercise of this Court's certiorari power is neither appropriate nor necessary. The interpretation under Maryland law of the terms of the parties' negotiated insurance policy is far removed from the role of this Court.

Armco attempts to by-pass the traditional rule that this Court will not review federal appellate decisions on questions of state law. It argues that the Fourth Circuit's decision frustrates federal policy embodied in

CERCLA [3] and RCRA [4] and that a uniform, federal rule should therefore be imposed.

Armco cannot transform a dispute under state contract and insurance law into an issue for this Court. In substance, it asks for this Court's discretionary review solely on the basis of its assertion that, without insurance coverage, "[s]ite operators and generators will be forced to bear the entire cost of remediation" at various hazardous waste sites. Petition at 6. According to Armco, that hypothetical development might thwart national policy embodied in CERCLA and RCRA. In reality, national environmental enforcement efforts—which seek to force industrial companies to internalize the costs of hazardous waste disposal—are promoted, not thwarted, by even-handed application of existing state law insurance rules. Armco simply aspires to evade its CERCLA and RCRA liability by shifting it to a "deep pocket."

Nor is it appropriate to create a uniform, federal rule simply because the application of diverse state law rules may result in different outcomes. This Court recognized and accepted that obvious fact in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 75 (1938), which foreclosed federal courts in diversity cases from "promot[ing] uniformity of law throughout the United States." Armco's objection to the potential for varying results under state law governing insurance coverage cases challenges the fundamental principles established by *Erie*.[5] It is singu-

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[3] Comprehensive Environmental Response, Compensation, and Liability Act of 1980, *as amended*, 42 U.S.C. §§ 9601-75.

[4] Resource Conservation and Recovery Act of 1976, *as amended*, 42 U.S.C. §§ 6901-91.

[5] For this reason, Armco's efforts to portray the outcome here as inconsistent with that of a divided panel opinion in another circuit in a case currently on rehearing *en banc* is unavailing. Armco concedes that Maryland law controls this case and that Missouri law controls the dispute now pending *en banc* before the Eighth Circuit. *See Continental Ins. Cos. v. Northeastern Pharm. & Chem. Co.*, 811 F.2d 1180, *reh'g en banc granted*, 815 F.2d 51 (8th Cir. 1987).

larly inappropriate in the context of an insurance dispute. National policy, as reflected in the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15, is that the "business of insurance" is to be regulated by state law. Indeed, in numerous respects, insurance law varies significantly from state to state.

Armco's final effort to fashion an issue worthy of certiorari is equally unavailing. It attempts to turn this private insurance coverage case into an action to overturn basic law governing the construction of government CERCLA and RCRA claims. Only one federal statutory question is even in the background of this contract dispute: whether the *CCC* suit is one seeking damages. Every court to consider that question—and there have been dozens—has held that RCRA and CERCLA claims for injunctive relief and restitution of response costs are equitable and do not constitute suits for damages. The Court denied certiorari earlier this year in a case brought by the United States that squarely presented that question. *United States v. Northeastern Pharmaceutical & Chemical Co.*, 108 S. Ct. 146 (1987). Armco suggests no reason to revisit that settled determination now in the anomolous context of a private contract dispute. There is none.

THE WRIT SHOULD BE DENIED

A. THE INTERPRETATION UNDER STATE LAW OF A MANUSCRIPT INSURANCE POLICY NEGOTIATED BETWEEN TWO SOPHISTICATED PRIVATE PARTIES IS NOT AN ISSUE WARRANTING CERTIORARI.

This is a diversity case in which the United States Court of Appeals for the Fourth Circuit and the United States District Court for the District of Maryland interpreted under Maryland law the terms of a manuscript insurance agreement negotiated between Armco and Maryland Casualty. Both courts below expressly grounded their decisions on the insurance law of the State of Maryland. *Maryland Casualty Co. v. Armco,*

Inc., 822 F.2d 1348, 1352 (4th Cir. 1987) (App. 17), *aff'g* 643 F. Supp. 430, 431 (D. Md. 1986) (App. 2). All four of the judges to consider the case reached the same result.

This Court repeatedly has stressed that its role is not to review federal appellate court decisions on matters of state law.[6] *E.g.*, *Pierson v. Ray*, 386 U.S. 547, 558 n.12 (1967); *Huddleson v. Dwyer*, 322 U.S. 232, 237 (1944). There is no reason to depart from that traditional rule here. A decision by this Court interpreting the Maryland Casualty-Armco insurance contract under Maryland law would not bind other states or other litigants. In fact, the Court consistently has denied certiorari in insurance coverage disputes governed by state law and arising in diversity cases.[7] Under the Court's longstanding approach, this case plainly does not warrant certiorari.

B. ARMCO'S SUGGESTION THAT ENFORCEMENT OF INSURANCE AGREEMENTS UNDER SETTLED STATE LAW SOMEHOW FRUSTRATES NATIONAL POLICY EMBODIED IN CERCLA OR RCRA IS WHOLLY WITHOUT MERIT OR SUBSTANCE.

Recognizing that the Court's traditional refusal to review state law issues bars certiorari on this case's cen-

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[6] Unlike its predecessor Rule 19, the current version of this Court's Rule 17 provides no basis for granting certiorari if a court of appeals' decision resolves "an important State or territorial question in a way in conflict with applicable state or territorial law."

[7] *E.g.*, *Eli Lilly & Co. v. Home Ins. Co.*, 794 F.2d 710 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 940 (1987); *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 682 F.2d 12 (1st Cir. 1982), *cert. denied*, 460 U.S. 1028 (1983); *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982); *Porter v. American Optical Corp.*, 641 F.2d 1128 (5th Cir.), *cert. denied*, 454 U.S. 1009 (1981); *Insurance Co. of N. Am. v. Forty-Eight Insulations*, 633 F.2d 1212 (6th Cir. 1980), *cert. denied*, 454 U.S. 1109 (1981).

tral question, Armco complains of a purported conflict between state insurance law and national policy embodied in CERCLA and RCRA.

The essence of Armco's complaint is its speculation that, under the decisions of the courts below applying the terms of the contract and Maryland law, "[s]ite operators and generators will be forced to bear the entire cost of remediation" at various hazardous waste sites. Petition at 6. Armco claims that this result "frustrates federal policy embodied in CERCLA." Petition at 7, n.2. It therefore urges this Court to impose "a national, uniform rule" superseding state law principles governing insurance contract interpretation. *Id.*

This is a blatant invitation to judicial social engineering. Armco asks this Court to dispense with the terms of contracts and with contract law standards in order to aid hazardous waste generators in evading the costs of their polluting activities. Under Armco's proposed approach, no contract provision and no state insurance law principle whose application restricted insurance coverage for a CERCLA or RCRA claim would survive. Instead, a "national, uniform rule" would afford the polluter a "free-ride" of coverage that is outside its policy's terms as construed under settled state insurance law rules.

No national policy embodied in CERCLA or RCRA compels—or, indeed, even supports—such a remarkable result. Federal enforcement efforts under environmental laws are in no way prejudiced by the even-handed application of state law to insurance contract disputes. As the Ninth Circuit stressed in *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1459 (9th Cir. 1986), "all responsible parties will be fully liable [under those statutes] to the government regardless of the indemnification contracts they have entered into." Insurance agreements "are essentially tangential to the enforcement of CERCLA's liability provisions" because they "cannot

alter or excuse the underlying liability of responsible parties." *Id.*[8] *See also* CERCLA Section 107(e)(1) (avoidance of liability to the government through private risk-shifting agreements prohibited, but such agreements are otherwise permitted and preserved). In enacting CERCLA and RCRA, Congress's intent was to force industrial companies to internalize the costs of hazardous waste disposal.[9] That goal is promoted by fulfilling the intentions of the parties through the straightforward application of their contracts' terms and related state law rules.[10]

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[8] *Mardan* refused to supersede state law with a uniform federal rule governing the interpretation of contractual arrangements apportioning CERCLA liability between private responsible parties. 804 F.2d at 1457-60. In addition to the considerations noted above, the Ninth Circuit recognized that application of a federal rule to such agreements "would disrupt commercial relationships predicated on state law." *Id.* at 1460.

[9] As the Senate Report explains, Congress designed CERCLA to "assur[e] that those who benefit financially from a commercial activity internalize the health and environmental costs of that activity into the costs of doing business." S. Rep. No. 848, 96th Cong., 2d Sess. 13 (1980). *See also United States v. Northeastern Pharm. & Chem. Co.*, 810 F.2d 726, 734 (8th Cir. 1986) (Congress "impos[ed] liability for the cost of cleaning up such sites upon those parties who created and profited from the sites and upon the chemical industrial as a whole"), *cert. denied*, 108 S. Ct. 146 (1987); *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1455 (9th Cir. 1986) (CERCLA was designed to "assure that the parties responsible for hazardous substances bore the costs of remedying the conditions they created"); *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986) ("Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created" (quoting *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1112 (D. Minn. 1982)).

[10] When, as here, environmental insurance coverage issues arise under a general liability policy, the parties clearly expect to be governed by state law. General liability insurance policies encom-

Armco complains that state law may produce varying results. In our federal system, that is of course the intended result. Different outcomes necessarily result from the application of diverse state law rules. This Court's ruling in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 75 (1938), recognized that circumstance. *Erie*, which requires a federal court sitting in diversity jurisdiction to apply the law of the state in which it sits, has long been held applicable to insurance cases. *E.g., Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202 (1938); *see generally* 2 G. Couch, *Couch on Insurance 2d* § 16:54 (2d rev. ed. 1984). The application of state law to insurance coverage disputes, and with it the concommitant potential for different outcomes under different state law rules, is also consistent with national policy reflected in the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15, under which the states are accorded primary power to regulate the business of insurance. Interpreting that Act, this Court has found the "business of insurance" to encompass the interpretation and enforcement of insurance policy terms. *SEC v. National Securities, Inc.*, 393 U.S. 453, 460 (1969).[11]

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pass a variety of risks, including the potential for claims arising from product liability, industrial explosions, equipment failures affecting non-employees, and the like. Those policies historically have been construed under state law for all risks.

[11] The interpretation of an insurance contract is not somehow transformed into a federal law issue simply because the underlying claim for which coverage is sought arises under a federal statute. Insurance coverage disputes often involve claims brought under a broad range of federal statutes. Both federal and state courts consistently have applied state common law rules to them. *E.g., Haines v. St. Paul Fire & Marine Ins. Co.*, 428 F. Supp. 435 (D. Md. 1977) (SEC enforcement action); *Crist v. Insurance Co. of N. Am.*, 529 F. Supp. 601 (D. Utah 1982) (civil rights action under 42 U.S.C. § 1983); *Maryland Cas. Co. v. Economy Bookbinding Corp. Pension Plan & Trust*, 621 F. Supp. 410 (D.N.J. 1985) (ERISA claims); *Stargatt v. Avenell*, 434 F. Supp. 234 (D. Del. 1977) (securities

In a decision issued within a week of *Erie*, this Court recognized in the specific context of an insurance coverage dispute that:

> As to questions controlled by state law, . . . conflict among the circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts.

Ruhlin v. New York Life Ins. Co., 304 U.S. 202, 206 (1938). Despite the permissibility of such conflict, Armco makes much of cases with outcomes it characterizes as irreconcilable with the Fourth Circuit's ruling. In particular, it portrays as inconsistent with the Fourth Circuit's ruling a decision by a divided panel of the Eighth Circuit in a case now pending on rehearing *en banc*. *Continental Ins. Cos. v. Northeastern Pharm. & Chem. Co.*, 811 F.2d 1180, *reh'g en banc granted*, 815 F.2d 51 (8th Cir. 1987). Armco concedes that "technically no dispute of law between the Fourth Circuit and the Eighth Circuit exists at present," Petition at 13, n.4, but simultaneously implies that disagreement is inevitable. Initially, it is, of course, far from clear that a "conflict," even in the imprecise sense that Armco suggests, will exist when the Eighth Circuit issues its *en banc* decision. More fundamentally, even should the full Eighth Circuit reiterate the 2-1 panel decision, that would at most indicate that Maryland and Missouri law differ. This would be the situation *Erie* envisioned and hardly a basis for certiorari.

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fraud claims); *CNA Casualty v. Seaboard Sur. Co.*, 176 Cal. App. 3d 598, 222 Cal. Rptr. 276 (1986) (antitrust claims); *Illinois Farmers Ins. Co. v. Preston*, 1987-88 Fire & Casualty Cas. (CCH) 27 (Ill. App. Ct. 1987) (civil rights action under 42 U.S.C. § 1983); *Hartford Acc. & Indem. Co. v. Village of Hempstead*, 48 N.Y.2d 218, 397 N.E.2d 737, 422 N.Y.S.2d 47 (1979) (civil rights action under 42 U.S.C. § 1983).

The Fourth Circuit's decision is firmly grounded on applicable state insurance law. Settled insurance rules reflected in Maryland law, as in the law of most other jurisdictions, support the result reached by the courts below.[12] Published opinions by four state supreme courts,[13] intermediate appellate courts in six other states,[14] and, in addition to the ruling in this case, six

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[12] *See generally* A. Windt, *Insurance Claims and Disputes* § 4.14 (1982) (injunctive relief and restitutionary relief requiring monetary payments are not regarded as damages within the meaning of liability insurance contracts).

[13] *Desrochers v. New York Cas. Co.*, 99 N.H. 129, 106 A.2d 196, 198-99 (1954) (no coverage for costs of complying with mandatory injunction); *O'Neill Investigations, Inc. v. Illinois Employers Ins.*, 636 P.2d 1170, 1177 (Alaska 1981) (no coverage for suit for injunctive relief and restitution); *Seaboard Sur. Co. v. Ralph Williams' Northwest Chrysler Plymouth, Inc.*, 81 Wash. 2d 740, 504 P.2d 1139, 1143 (1973) (*en banc*) (no coverage for suit for injunctive relief and restitution); *City of Thief River Falls v. United Fire & Cas. Co.*, 336 N.W.2d 274, 275-76 (Minn. 1983) (no coverage for suit seeking mandamus).

[14] *Jaffe v. Cranford Ins. Co.*, 168 Cal. App. 3d 930, 214 Cal. Rptr. 567, 570 (1985) (no coverage for suit seeking restitutionary payment); *Garden Sanctuary, Inc. v. Insurance Co. of N. Am.*, 292 So. 2d 75, 77 (Fla. Dist. Ct. App. 1974) (no coverage for equitable claims for restoration of cemetery); *Board of Ed. v. Country Mut. Ins. Co.*, 121 Ill. App. 3d 124, 459 N.E.2d 273 (1984) (no coverage in suit for writ of mandamus and injunctive relief); *Ladd Constr. Co. v. Insurance Co. of N. Am.*, 73 Ill. App. 3d 43, 391 N.E.2d 568, 573 (1979) (no coverage for suit seeking injunction directing insured to remove debris encroaching on railroad's right-of-way); *Gulf & Western Indus., Inc. v. Seaboard Sur. Co.*, 100 A.D.2d 820, 474 N.Y.S.2d 754, 755 (1st Dep't 1984) (no coverage for costs of complying with injunctive provisions of consent judgment); *Township of Jackson v. American Home Assur. Co.*, No. A-170-81T3 (N.J. Super. Ct. App. Div. Mar. 24, 1982) (finding a duty to defend because underlying suit sought compensatory damages as well as equitable relief); *see also International Mineral & Chem. Co. v. Liberty Mut. Ins. Co.*, No. 84-L-50979 (Cir. Ct., Cook County, Ill. Jan. 6, 1987) (no coverage for equitable CERCLA claims); *CPS Chem. Co. v. Continental Ins. Co.*, No. L-060537-84 (N.J. Super. Ct. March 11, 1987) (no coverage for costs of comply-

other federal courts,[15] including the United States District Court for the District of Maryland,[16] support the finding, as expressed by the district court, that "[b]lack letter insurance law holds that claims for equitable relief are not claims for 'damages' under liability insurance contracts." 643 F. Supp. at 432 (App. 3). Far from departing from settled legal standards and thereby thwarting the objectives of the federal environmental laws, the courts below have followed traditional insurance law found both in Maryland and elsewhere.

C. THE ONLY FEDERAL STATUTORY QUESTION THAT UNDERLIES THE INSURANCE CONTRACT DISPUTE IS SETTLED BY AN UNBROKEN LINE OF AUTHORITY AND, AS THIS COURT RECENTLY RECOGNIZED, IS NOT WORTHY OF CERTIORARI.

The only federal statutory question underlying this insurance contract dispute is whether government RCRA

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ing with injunction compelling environmental cleanup); *Protective Nat'l Ins. Co. v. Union Oil Co.*, No. C-514-463 (Cal. Super. Ct. Oct. 29, 1987) (no coverage for equitable CERCLA claims).

[15] *Aetna Cas. & Sur. Co. v. Henna*, 224 F.2d 499 (5th Cir. 1955) (no coverage for suit seeking injunctive relief); *Board of County Comm'rs v. Guarantee Ins. Co.*, 90 F.R.D. 405, 408 (D. Colo. 1981) (no coverage for attorneys fees in suit for declaratory and injunctive relief); *Haines v. St. Paul Fire & Marine Ins. Co.*, 428 F. Supp. 435, 443 (D. Md. 1977) (no coverage for suit for injunctive relief, restitution and disgorgement); *see also Battisti v. Continental Cas. Co.*, 406 F.2d 1318, 1320 n.2 (5th Cir. 1969) (noting limitation on coverage to suits "seeking damages" in case where complaint amended to add prayer for damages); *Crist v. Insurance Co. of N. Am.*, 529 F. Supp. 601, 604, 606 (D. Utah 1982) (insurers' contractual duties extend to damage claims and "not to claims seeking an injunctive form of relief"); *County of Suffolk v. Royal Globe Ins. Co.*, 1981 Fire & Casualty Cas. (CCH) 1457, 1459 (E.D.N.Y. 1981) (finding a duty to defend because underlying suit principally sought compensatory damages, not injunctive relief).

[16] *Haines v. St. Paul Fire & Marine Ins. Co.*, 428 F. Supp. 435, 443 (D. Md. 1977).

and CERCLA claims for injunctive relief and restitution of response costs constitute claims for damages. This has not proven to be a difficult question. An unbroken line of authority holds that those claims are equitable. Recognizing the absence of any need to review that unanimous conclusion, this Court refused certiorari earlier this year in a government case squarely presenting that question. *See United States v. Northeastern Pharm. & Chem. Co.*, 108 S. Ct. 146 (1987). In deciding this private contract case, the courts below merely accepted this now-established determination as the premise of their contract analysis.

Under RCRA section 7003[17] and CERCLA section 106,[18] the government seeks in *CCC* a mandatory injunction, compelling Armco and its co-defendants to clean up the site. The injunction, which represents the lion's share of the relief sought,[19] is plainly an equitable remedy. Armco does not—and indeed could not—dispute that RCRA and CERCLA injunctive relief is equitable. The uniform holdings of every court to consider the question under RCRA or CERCLA, *e.g.*, *United States v. Price*,

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[17] RCRA section 7003(a) authorizes the government to bring suit in the event of an endangerment to "restrain" a generator, transporter, site owner or operator from handling, treatment, transportation or disposal of hazardous waste, or "to order such person to take such other action as may be necessary, or both." 42 U.S.C. § 6973(a). Congress explicitly stated that "section 7003 provides for the awarding of equitable relief." S. Rep. No. 284, 98th Cong., 1st Sess. 59 (1983).

[18] CERCLA section 106(a) authorizes the government "to secure such relief as may be necessary" to abate an endangerment posed by a hazardous waste site, and confers on the district court "in the district in which the threat occurs . . . jurisdiction to grant such relief as the public interest and equities of the case may require." 42 U.S.C. § 9606(a).

[19] The response costs incurred at the site for which restitution is sought consist merely of investigatory and litigation costs. First Amended Complaint in *CCC* ¶¶ 37, 50, 72.

688 F.2d 204, 212-13 (3d Cir. 1982) (mandatory injunction directing defendants to fund diagnostic site study is equitable),[20] reflect traditional general legal principles that an injunction is a purely equitable remedy, *e.g.*, *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311 (1982) ("[i]t goes without saying that an injunction is an equitable remedy").[21]

Ignoring the principal relief sought in the underlying complaint, Armco focuses on the periphery. It seeks to make much of the fact that the government, as a corollary to its principal injunctive objective, also seeks reimbursement of response costs, such as investigatory and legal expenses, it incurred at the CCC site.[22] Armco asserts that these ancillary response costs are a form of restitution at law and therefore constitute damages. In reality, as with the injunctive relief counts, the remedy sought in the cost-recovery or restitution counts of the government complaint is plainly an equitable one.

Specifically, the Eighth Circuit's decision in *United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726, 749 (8th Cir. 1986), *cert denied*, 108 S. Ct. 146 (1987), explains: "When the government seeks recovery of its response costs under CERCLA or its abatement costs under RCRA, it is in effect seeking equitable

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[20] *See also United States v. Conservation Chem. Co.*, No. 82-0983-CV-W-5 (W.D. Mo. May 14, 1985) (adopting Special Master's Recommendations Regarding General Dynamics Corporation's Demand for Jury Trial (April 29, 1985)); *United States v. Wade*, 20 Env't Rep. Cas. (BNA) 1853 (E.D. Pa. 1984); *United States v. Northeastern Pharm. & Chem. Co.*, No. 80-5066-CV-S-4 (W.D. Mo. Sept. 30, 1983), *aff'd in relevant part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 108 S. Ct. 146 (1987); *United States v. Reilly Tar & Chem. Corp.*, 20 Env't Rep. Cas. (BNA) 1052 (D. Minn. 1983).

[21] *See also United States v. Louisiana*, 339 U.S. 699, 706 (1950); 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2308 (1971); D. Dobbs, *Handbook on the Law of Remedies* 105 (1973).

[22] *See* First Amended Complaint in *CCC* ¶¶ 37, 50, 72.

relief in the form of restitution or reimbursement of the costs it expended in order to respond to the health and environmental danger presented by hazardous substances." [23] Once again, as with the equitable nature of CERCLA and RCRA claims for injunctive relief, this conclusion has been reached by *every* court to consider the question.[24]

Armco offers no reason for this Court to revisit its determination that this settled question of statutory interpretation does not require certiorari. Indeed, it never even acknowledges that earlier this year the Court refused to review it. *See United States v. Northeastern*

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[23] As the courts consistently have held, the theory of recovery in CERCLA and RCRA cost-reimbursement claims is for unjust enrichment, based on the government's substituted performance for the defendants in incurring costs in response to a toxic waste problem the defendants created. *E.g., United States v. Georgeoff*, 22 Env't Rep. Cas. (BNA) 1601, 1602 (N.D. Ohio 1984) (the "United States has performed the duty of another" and "acts to protect the public from potential danger caused by another's conduct, disposal of hazardous waste"); *United States v. Reilly Tar & Chem. Corp.*, 20 Env't Rep. Cas. (BNA) 1052, 1056 (D. Minn. 1983) (the "United States is asking for the return of monies it expended on Reilly Tar's behalf, to safeguard public health . . . . Such a return is precisely what the equitable remedy of restitution has as its goal").

[24] *E.g., United States v. Miami Drum Servs., Inc.*, No. 85-0038-CIV-SCOTT (S.D. Fla. July 17, 1986); *United States v. Dickerson*, 640 F. Supp. 448, 453 (D. Md. 1986); *United States v. Mottolo*, 605 F. Supp. 898, 913 (D.N.H. 1985); *United States v. Ward*, 618 F. Supp. 884, 913 (E.D.N.C. 1985); *United States v. Conservation Chem. Co.*, No. 82-0983-CV-W-5 (W.D. Mo. May 14, 1985); *Mola Dev. Corp. v. United States*, No. CV-82-0819-RMT (JRX) (C.D. Cal. Feb. 11, 1985); *Wehner v. Syntex Corp.*, 618 F. Supp. 37, 37 (E.D. Mo. 1984); *United States v. Tyson*, No. 84-2663 (E.D. Pa. Nov. 28, 1984); *United States v. Union Gas Co.*, 22 Env't Rep. Cas. (BNA) 1603 (E.D. Pa. 1984); *United States v. Wade*, 20 Env't Rep. Cas. (BNA) 1853, 1855-56 (E.D. Pa. 1984); *United States v. Argent Corp.*, 21 Env't Rep. Cas. (BNA) 1353, 1354 (D.N.M. 1983); *United States v. Reilly Tar & Chem. Corp.*, 20 Env't Rep. Cas. (BNA) 1052, 1056 (D. Minn. 1983).

Pharm. & Chem. Co., 108 S. Ct. 146 (1987).[25] Armco suggests no development since then that makes this issue worthy of certiorari now. There is none.

CONCLUSION

For all of the reasons set forth above, Armco's petition for a writ of certiorari should be denied.

Respectfully submitted,

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December 9, 1987

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[25] A unanimous Eighth Circuit panel held in *United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 108 S. Ct. 146 (1987), as all courts to address the question have, that CERCLA and RCRA claims for injunctive relief and restitution of response costs are equitable actions that do not seek damages. The author of that decision, Judge McMillian, dissented in *Continental Insurance Cos. v. Northeastern Pharmaceutical & Chemical Co.*, 811 F.2d 1180, *reh'g en banc granted*, 815 F.2d 51 (8th Cir. 1987), a case that considers insurance coverage for *United States v. Northeastern Pharmaceutical & Chemical Co.* His dissent stresses the obvious contradiction between holding that CERCLA and RCRA cost-recovery claims are not suits for damages in the environmental enforcement action, yet finding coverage for them *as suits for damages* in the insurance dispute. 811 F.2d at 1193-95. That issue is now before the Eighth Circuit *en banc*.